**MUNISVARAN KANNAN** *a*

**v.**

**MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & ANOR**

HIGH COURT MALAYA, JOHOR BAHRU *b*
KP GENGADHARAN NAIR JC
[CRIMINAL APPLICATION NO: MT(1) 44-01-2003]
20 APRIL 2004

***CONSTITUTIONAL LAW:*** *Legislation - Legislation affecting fundamental liberties of the individual - Construction of such legislation - Whether to be interpreted literally and strictly* *c*

***STATUTORY INTERPRETATION:*** *Construction of statutes - Literal approach - Legislation affecting fundamental liberties of the individual - Whether literal and strict interpretation called for* *d*

***CONSTITUTIONAL LAW:*** *Fundamental liberties - Liberty of person - Protection afforded by law - Whether every aspect of protection material - Whether the right to personal liberty may be curtailed by violation or omission of procedural or technical safeguards* *e*

***PREVENTIVE DETENTION:*** *Detention order - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Whether amenable to judicial review - Extent of judicial review*

***PREVENTIVE DETENTION:*** *Detention order - Detention by police pending inquiry - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Whether powers of police amenable to judicial review* *f*

***PREVENTIVE DETENTION:*** *Detention order - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Detention in breach of time limits - Whether detention unlawful - Whether habeas corpus may be issued* *g*

The applicant was detained under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). He applied for a writ of *habeas corpus*. The facts were that the applicant was detained by the police under s. 3(1) of the Ordinance at 3.10pm on 13 March 2002. His further detention was *h* authorized by an appropriate officer for 24-hours from 3.10pm on 14 March 2002. On 15 March 2002, an authorization for the continued detention of the applicant for a period of 28 days with effect from 3.10pm that same day (15 March 2002) was issued by an appropriate officer. However, the exact time *i*

the authorization was given on 15 March 2002 was not known. The applicant was subsequently detained for two years from 11 May 2002 under a detention order issued by the Deputy Minister for Home Affairs ('the Minister') under s. 4(1) of the Ordinance. Counsel argued that a doubt had arisen as to whether the authorization for the continued detention of the applicant was given before or after 3.10pm on 15 March 2002. If it was after 3.10pm, then said counsel, s. 3(3)(b) of the Ordinance would have been breached in that the applicant would then have been detained for more than 48-hours from 3.10pm on 13 March 2002 without the necessary mandatory authorization required by the Ordinance, thereby rendering the applicant's detention in excess of the 48-hours illegal. The senior federal counsel, relying on *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81 submitted *inter alia* that the technicality of time under s. 3(3) of the Ordinance did not affect the Minister's satisfaction that the applicant had to be detained under s. 4 of the Ordinance. The main issue before the High Court focused on the procedural requirements of s. 3 of the Ordinance, specifically concerning the time periods involved in the applicant's detention and police authorization for his further detention.

**Held (allowing the application and ordering the release of the applicant):**

**[1]** The Ordinance sets out time frames and procedures to be adhered to for the curtailment of the liberty of a person arrested under the provisions of the Ordinance. These provisions and safeguards have to be interpreted both literally and strictly as they involve the fundamental liberties and the right to freedom of an individual. *Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam and Anor Application* [1993] 3 MLJ 673 (foll); *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 4 CLJ 47 (foll). (pp 386 f & 387 a-b)

**[2]** In the instant case, the detention of the applicant under s. 4 of the Ordinance was a continuation or consequential progression of the initial arrest/detention of the applicant by the police under s. 3 of the Ordinance. It, therefore, followed that the Minister's order for the detention of the applicant was dependent on the report made to him by the police after the police had arrested and detained the applicant under s. 3 of the Ordinance. Thus, if there was a violation of the provisions of s. 3 of the Ordinance in so far as the rights of the applicant were concerned then his continued detention arising therefrom would become unlawful and improper. In such circumstances, the applicant would be entitled to be set free on a writ of *habeas corpus*. He would be entitled to the protection guaranteed by art. 5 of the Federal Constitution. (pp 388 h & 389 a)

**[3]** In cases involving the personal liberty of a person, each and every aspect of protection, be it procedural or technical, becomes very material. When it is violated, the subject is entitled to look at the law and the courts to ensure that this right to liberty is not curtailed by the violation or omission of any procedural or technical safeguard as otherwise the safeguard envisaged will be meaningless and a mere fiction dressed up with apparently protective clothing made by way of porous material thereby offering no protection at all in reality. This right is not to be a mere illusion. The remedy through a writ of *habeas corpus* must be available in such circumstances. (p 394 e-f)

**[4]** The factual situation and issues in *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81 were different from those in the instant case. The crux of the attack in *Nasharuddin* was against the decision of the Minister in making the detention order. There was no complaint about any non-compliance with any procedural requirement in the ISA governing the Minister's act or decision. Futher both *Nasharuddin* and *Mohamed Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309 cases involved matters of national security and in such cases the courts have been wary of interfering with the discretion vested in the Minister to decide upon the detention of persons in the interests of national security. *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81 (dist); *Mohamed Ezam Mohd Noor v. Ketua Polis Negara & Others Appeals* [2002] 4 CLJ 309 (dist). (pp 395 g-h & 396 a-b)

**[5]** Judicial review generally, and a writ of *habeas corpus* in particular, can be granted if there is non-compliance by the Minister or the Yang di-Pertuan Agong with any procedural requirement in the Ordinance governing the exercise of discretionary power vested under the Ordinance. Whilst s. 7C of the Ordinance expressly bars judicial review of the Minister's discretionary power such as in s. 4(1) of the Ordinance save in respect of non-compliance of procedural requirements, the Ordinance does not expressly exclude judicial review, including by way of a writ of *habeas corpus*, in any way whatsoever in respect of the powers of the police to detain a person under s. 3 of the Ordinance. (pp 397 f-h & 399 a-b)

**[6]** Whereas s. 4C of the Ordinance excuses certain breaches of procedures in some circumstances, it does not excuse detention without the necessary authorization as required under s. 3(3) of the Ordinance. Thus, a detention in breach of the time limits specified in s. 3 is unlawful. The applicant should be entitled to his freedom not because the decision or reasons to

detain him under s. 4 of the Ordinance were bad, tainted or *mala fides* but because the protection accorded to him by s. 3 of the Ordinance had been violated prior to his continued detention under s. 4 of the Ordinance. (pp 399 f & 400 b)

**Case(s) referred to:**

*Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129* ***(refd)***

*Kerajaan Malaysia & Ors v. Nasharuddin Nasir [2004] 1 CLJ 81 FC* ***(refd)***

*Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam And Another Application [1993] 3 MLJ 673* ***(refd)***

*Mohamed Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC* ***(refd)***

*Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 4 CLJ 47 SC* ***(refd)***

*Re Tan Sri Khalid Raja Harun [1988] 1 MLJ 182* ***(refd)***

*Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293* ***(refd)***

**Legislation referred to:**

Dangerous Drugs (Special Preventive Measure) Act 1985, s. 3(2)(c)

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(1), (3)(a), (b), 4(1), (4), 4C, 5(1), (2), 6(1), 7C, 7D

Federal Constitution, art 5(1), (2)

Internal Security Act 1960, ss. 8, 73(1)

*For the applicant - V Shanmugam (G Subramaniam Nair); M/s Maniam Nair & Co*
*For the respondents - Mohamad Abazafree Mohd Abbas DPP*

*Reported by Andrew Christopher Simon*

## JUDGMENT

**KP Gengadharan Nair JC:**

This was an application for a writ of *habeas corpus* by Munisvaran a/l Kannan ("the applicant") for his release from detention in Pusat Pemulihan Akhlak Simpang Renggam, Johor.

**The Detention Order & Allegations**

The applicant was detained under a detention order dated 10 May 2002 made pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance"). The detention order read as follows:

ORDINAN DARURAT (KETENTERAMAN AWAM DAN MENCEGAH JENAYAH), 1969
PERINTAH TAHANAN
[Seksyen 4(1)]

Kepada:

Penguasa
Pusat Pemulihan Akhlak
Simpang Rengam, Johor

Ketua Polis Negara
Bukit Aman - 50560 KUALA LUMPUR

Semua Pegawai Polis Diraja Malaysia yang berkenaan.

BAHAWASANYA saya, berpuashati yang Perintah ini adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini dengan tujuan hendak mencegah beliau daripada melakukan perbuatan jenayah yang melibatkan kekerasan.

| Nama | Nombor Kad Pengenalan |
|---|---|
| MUNISVARAN A/L KANNAN | 760126-01-6705 |

Oleh yang demikian, pada menjalankan kuasa yang diberi kepada saya di bawah Seksyen 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah), 1969, maka saya mengarahkan dengan Perintah ini supaya orang yang namanya tersebut di atas ditahan selama dua tahun mulai dari 11 haribulan Mei, 2002 di Pusat Pemulihan Akhlak, Simpang Rengam, Johor atau di mana-mana tempat lain sebagaimana yang diarah oleh saya dari semasa ke semasa.

Ditandatangan pada 10 haribulan Mei, 2002.

t.t.
(DATO' ZAINAL ABIDIN BIN ZIN)
TIMBALAN MENTERI DALAM NEGERI
MALAYSIA.

(Bil. KDN. S. POPOC 14376)

At the time of the service of the detention order on the applicant he was also served with a copy of the document setting out the reasons for his detention and this stated as follows:

**ORDINAN DARURAT (KETENTERAMAN AWAM DAN MENCEGAH JENAYAH) 5/69**

NAMA ORANG TAHANAN : MUNISVARAN A/L KANNAN

NO. KAD PENGENALAN : 760126-01-6705

**ALASAN-ALASAN YANG PERINTAH ITU DIBUAT**

Bahawa kamu adalah seorang penjenayah yang melakukan jenayah yang berunsurkan kekerasan.

TUDUHAN-TUDUHAN YANG PERINTAH ITU BERASASKAN

Bahawa kamu adalah seorang ahli kumpulan penjenayah India yang bergiat cergas melakukan jenayah curi kenderaan berisi muatan barangan (hijacking) dan jenayah yang berunsurkan kekerasan disekitar Negeri Johor. Diantara kejadian-kejadian yang melibatkan kamu adalah berikut:-

1. Bahawa kamu adalah seorang ahli kumpulan kongsi gelap "Hong Hong San" yang aktif melakukan jenayah berunsurkan kekerasan dipersekitaran kawasan Ulu Tiram, Johor Bahru, Johor.

2. Bahawa kamu pada awal bulan Jun 1999, jam lebih kurang 9.30 malam, di sebuah rumah milik mangsa di Taman Puteri Wangsa, Ulu Tiram, Johor, bersama beberapa orang rakan sejenayah kamu dengan bersenjatakan 2 bilah parang dan rotan telah cuba menyerang mangsa. Apabila mangsa enggan keluar dari rumah setelah dipanggil, kamu dan rakan sejenayah kamu telah bertindak merosakkan motosikal milik mangsa yang diletakkan di hadapan rumah.

3. Bahawa kamu pada 20.8.2001, jam lebih kurang 2.00 pagi, di kawasan kebun kelapa sawit, tepi jalan KM 30, Jalan Johor-Kota Tinggi, bersama beberapa orang rakan sejenayah kamu telah cuba melakukan samun dengan menangkap seorang mangsa Pengawal Keselamatan di tempat tersebut. Apabila mangsa menjerit dan cuba melawan, salah seorang ahli kumpulan kamu telah memukul mangsa dengan sebatang besi dan menendang beberapa kali sehingga menyebabkan mangsa pengsan. Mangsa mendapat kecederaan dan menerima 18 jahitan di bahagian kepala.

Dengan Arahan
Timbalan Menteri Dalam Negeri

Tarikh: 10 Mei 2001

t.t.
(ABDUL RAHIM BIN MISBAN)
Penolong Setiausaha
Kementerian Dalam Negeri.

(Ruj. KDN.S.POPOC 143746)

**The Facts, Issues And Merits Of The Motion**

The affidavit in support of the applicant's application for a writ of *habeas corpus* (encl. 2) was affirmed by his sister, Ambikai a/p Kannan. She had explained in the affidavit that the applicant was unable to affirm the affidavit as he was then being detained. The senior federal counsel appearing on behalf of the respondents had no objection to the affidavit being affirmed by the sister of the applicant.

This affidavit stated, *inter alia*, that the applicant was first arrested in Malacca by the police on 4 February 2002 and then released but thereafter subjected to periods of arrests releases and re-arrests. During the course of the arrests he was held in various lockups in Kota Tinggi, Kulai, Skudai and Plentong, all in Johor allegedly in respect of different police reports so as to, it was alleged, enable the applicant to be detained for periods of fourteen days in respect of each report. The applicant's sister referred to such arrests, release and re-arrests as being allegedly known in police language or parlance as "Marathon arrest and detention" and contended that this was an abuse of the provisions of the Criminal Procedure Code by the police. It had also been alleged that during these detentions by the police the applicant was not informed of the grounds for his arrest.

There was also a further allegation that having failed to obtain sufficient evidence against the applicant during those detentions, the police, then, with "*mala fide* intent" proceeded to arrest the applicant under s. 3(1) of the Ordinance and was then subsequently ordered to be detained by the Deputy Home Affairs' Minister for a period of two years w.e.f. 11 May 2002 under s. 4(1) of the Ordinance.

The detention of the applicant under the Ordinance was attacked on several grounds in the affidavit filed on behalf of the applicant such as that:

1. the order to detain was defective due to the failure to identify in the detention order as to who exactly was satisfied that the applicant had to be detained.

2. the order did not refer to the charges against the applicant.

3. the grounds given by the police that there were justifiable reasons for the applicant's detention were *'mala fide'* and without any basis.

4. the applicant was not taken before a Magistrate upon his arrest under the Ordinance and that therefore he was not accorded the protection envisaged by art. 5 of the Federal Constitution.

5. when the applicant was taken to the detention centre he was not informed of his rights under the law, particularly of his right to make representations against the detention and further that the representation forms were not given to him within the time frame stipulated by the Ordinance.

6. the applicant was not provided with the documents in relation to his detention.

7. the Advisory Board referred to in the Ordinance was not properly constituted in accordance with the Ordinance, Rules of the Advisory Board and the Federal Constitution.

8. the Advisory Board did not make the necessary representations to His Majesty, the Yang di-Pertuan Agong within the stipulated time period.

The material provisions of the Ordinance in relation to the aforementioned grounds are ss. 3, 4(1) & (4), 5(1) & (2) and 6(1). I reproduce below the said provisions for easy reference. These read as follows:

> s. 3(1) Any police officer may without warrant arrest and detain pending enquires any person in respect of whom he has reason to believe that there are grounds which would justify his detention under section 4(1).
>
> (2) Any police officer may without warrant arrest and detain pending enquires any person who on being questioned by him fails to satisfy him as to his identity or as to the purpose for which he is in the place where he is found. If the police officer suspects that person of having acted or being about to act or being likely to act in any manner prejudicial to public order or if he has reason to believe that it is necessary for the suppression of violence or the prevention of crimes involving that that person should be detained.
>
> (3) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty-days without an order of detention having been made in respect of him under section 4(1):
>
> Provided that:
>
> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent;
>
> (c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General of

Police or to a police officer designated by the Inspector-General in that behalf and the Inspector or the police officer so designated by him as the case may be, shall forthwith report the same to the Minister.

(4) The powers conferred upon a police officer by sub-sections (1) and (2) may be exercised by any member of the security forces, by any person performing the duties of guard or watchman in a protected place, and by any other person generally authorized in that behalf by a Chief Police Officer.

(5) Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorized generally or specially by the Minister.

s. 4(1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a "detention order") directing that that person be detained for any period not exceeding two years.

(4) Whenever any person is detained under a detention order shall, in accordance with Article 151 of the Constitution, as soon as may be:

(a) be informed of the grounds of this detention;

(b) subject to Clause (3) of the said Article ('which provides that no authority may be required to disclose facts whose disclosure would in its opinion be against the national interest) be informed of the allegations of fact on which the order is based, and;

(c) be given the opportunity of making representations against the order as soon as may be.

5(1). A copy of every detention order shall as soon as maybe after the making thereof be served on the person to whom it relates and every such person shall be entitled to make representations against the order to an Advisory Board.

(2) For the purpose of enabling a person to make representations under sub-section (1) he shall, at the time of the service on him of the order:

(a) be informed of his right to make representations to any Advisory Board under sub-section (1): and

(b) be furnished by the Minister with a statement in writing:

(i) of the grounds on which the order is made;

(ii) of the allegations of fact on which the order is based; and

(iii) of such other particulars, if any, as he may in the opinion of the Minister reasonably require in order to make his representations against the order to the Advisory Board.

s. 6(1) Whenever any person has made any representations under section 5(1) to an Advisory Board, the Advisory Board, shall within three months from the date on which such representations were received by the Advisory Board or such longer period as the Yang di-Pertuan Agong may allow, consider such representations and make recommendations, thereon to the Yang di-Pertuan Agong.

At the commencement of the hearing of this application the court was informed by Mr. V. Shanmugam (together with Mr. G. Subramaniam Nair), counsel for the applicant, that although there were a number of issues in this matter he had, after a discussion with the senior federal counsel, Encik Mohamad Abazafree b. Mohd. Abbas, decided to proceed with only one issue and that was in respect of the provisions of s. 3(3)(a) & (b) of the Ordinance alleging that there was a breach of s. 3(3)(b) of the Ordinance in this case thereby rendering the continued detention of the applicant as being bad in law.

It was an undisputed fact as confirmed in the affidavit filed on behalf of the respondents that the applicant was arrested and detained by the police at 3.10pm on 13 March 2002 under s. 3(1) of the Ordinance. As s. 3(3)(a) of the Ordinance provides that a detention is not to exceed twenty four hours except with the authority of a police officer of or above the rank of Inspector the applicant's detention was authorized (on 13 March 2002 itself) to be extended for another twenty four hours from 3.10pm on 14 March 2002 ie, up to 3.10pm on 15 March 2002. Section 3(3)(b) of the Ordinance provides that the detention is not to exceed forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent. It was also an undisputed fact that on 15 March 2002 an authorization for the further detention of the applicant w.e.f. 3.10pm on that day for a period of twenty eight days was given by an appropriate officer but the exact time when the authorization in fact was given on the said day ie, on 15 March 2002 was not known. It was neither stated anywhere in the affidavits filed on behalf of the respondents nor in any of the exhibits thereto. There was, therefore, no evidence whatsoever before this court in this regard.

It was submitted on behalf of the applicant that since the actual time when the authorization for the extension of the applicant's detention beyond the forty eight hours' period was given on 15 March 2002 was not known a doubt had thereby arisen as to whether the authorization for the continued detention of the applicant was given before or after 3.10pm on the said day. If it was after 3.10pm then s. 3(3)(b) of the Ordinance had been breached in that the applicant would then have been detained for more than forty eight hours from 3.10pm on 13 March 2002 without the necessary mandatory authorization as stipulated in the said ordinance thereby rendering the applicant's detention in excess of the forty eight hours illegal. It was also contended that s. 3(3)(b) of the Ordinance was a substantial procedural provision and that in such circumstances when there was a doubt as to whether the Applicant's right not to be detained for more than forty eight hours other than in accordance with s.3(3)(b) of the Ordinance had been violated the benefit of such a doubt must go to the detainee. Thus, the challenge in this regard was confined solely to the procedural requirements of s. 3 of the Ordinance. This left the reasons for the detention of the applicant under s. 4(1) of the Ordinance intact and unquestioned.

The learned senior federal counsel on behalf of the respondents whilst conceding that there was a "technical defect" in respect of the detention order issued under s. 3(3)(b) of the Ordinance proceeded to raise the issue of whether the technicality of time under s. 3(3) could affect the detention of the applicant under s. 4 of the Ordinance. Relying on the Federal Court's decision in *Kerajaan Malaysia & 2 Ors v. Nasharuddin bin Nasir* [2004] 1 CLJ 81 it was submitted that the technicality of time under s. 3(3) of the Ordinance did not affect the Minister's satisfaction that the applicant had to be detained under s. 4 of the Ordinance. Submitting that the aforesaid case had changed the position in law thereby rendering the earlier decisions in this regard irrelevant it was urged that the detention of the applicant was lawful and that therefore the application should be dismissed.

*Nasharudin*'s case *(supra)* was also a case of an application for a writ of *habeas corpus* pertaining to a detention under the Internal Security Act 1960 (ISA). The detainee in that matter was arrested by the police pursuant to s. 73(1) of the ISA and whilst under such detention by the police he filed an application for *habeas corpus* but before this case could be heard the Minister had issued the detention order under s. 8 of the ISA. Thus, at the hearing in the High Court the application was heard as if it was an application against the detention order of the Minister. I will return to that case later on in this judgment.

This stand taken by the senior federal counsel appeared to have surprised the applicant's counsels who, it seemed, thought that their initial understanding with the senior federal counsel was that the application would be argued merely by relying on s. 3 of the Ordinance only. It was then clear that there was a misunderstanding and/or miscommunication between the counsels thereby leading to Mr. Shanmugam raising, on behalf of the applicant, further issues and grounds for the application. He submitted further such as, in gist, that:

1. one of the affidavits (encl. 4) filed on behalf of the respondent stated that the documents pertaining to the detention under s. 4 of the Ordinance was served on the applicant and translated to him on 13 March 2002 at 3.10pm whereas the detention order was only made on 10 May 2002, an impossibility.

2. paragraph 4 of the encl. 4 referred to the date when the translation of the order of detention by the Minister dated 10 May 2002 was made to the applicant as being on 20 September 2001.

3. the document setting out the reasons/charges for the applicant's detention under s. 4 of the Ordinance and served on the applicant was dated 10 May 2001 when in fact it was only served together with the detention order dated 10 May 2002.

The error in stating the year as being "2001" in the dating of the charges had been explained in the affidavit in reply filed on behalf of the respondents. Further, there were also errors in reference to certain dates in the affidavits as referred to above. However, these errors did not, in my view, go to the root of the detention of the applicant to make it illegal and/or improper to warrant interference with the detention of the applicant on those grounds.

It is clear that the Ordinance sets out time frames and procedures to be adhered to for the curtailment of the liberty of a person arrested under the provisions of the Ordinance. These provisions and safeguards had/have to, in my view, be interpreted both literally and strictly as they involved the fundamental liberties and the right to freedom of an individual.

L.C Vohrah J (as he then was) had in his judgment in the then Supreme Court's case of *Menteri Hal Ehwal Dalam Negeri & Anor v. Lee Gee Lam and Another Application* [1993] 3 MLJ 673 stated thus:

> In this regard, we were alerted by counsel for the respondents to a well-considered judgment of the High Court, *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor*,[2] wherein Edgar Joseph Jr J (as he then was), in allowing the detenu's application for *habeas corpus* had this to say (at pp 29-30):

> There had been a consistent current of judicial opinion in our courts, including the latest decisions of the Supreme Court, which indicate that when confronted with the problem of interpreting powers of preventive detention, they have interpreted them strictly so as to require that the provisions of the relevant statute are rigidly and meticulously complied with, (see for example, *Tan Hoon Seng v. Minister of Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171, *Rajoo a/o Ramasamy v. Inspector General of Police & Ors* [1990] 2 MLJ 87, and a series of 11 recent appeals heard together, the first being *Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 297, in all of which the detainee succeeded on purely procedural or technical grounds.)
>
> We were of the view that the above observations of the learned judicial commissioner and those of the learned judge reflect the correct attitude of the courts in interpreting provisions relating to the exercise of the power of detention without a trial.

In *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi* [1994] 4 CLJ 47, a case involving a procedural requirement under s. 3(2)(c) of the Dangerous Drugs (Special Preventive Measure) Act 1985, the then Supreme Court's judgment by Wan Yahya bin Pawan Teh SCJ (as he then was) stated that:

> In any event, in cases of this nature the appellant is nevertheless entitled to take advantage of any technical imperfection which has the effect of invalidating the restrictive order, or to use the precise words of Regby J in *Ex Parte Johannes Choeldi & Ors.* [1960] 26 MLJ 184 at 186:
>
> > The distinction, no doubt, is a highly artificial one. But this is an application for a writ of *habeas corpus*, and the applicants in matter which concern their personal liberty, are entitled to avail themselves of any technical defects which may invalidate the order which deprive them of that liberty.
>
> Laws which deprive the subjects of their rights to personal liberty are subject to strict construction in the same way as penal laws – see *Nagin Singh c. Jagannath*, AIR 1944 Lah 422. It is a recognized principle of interpretation that laws which encroach on the rights of the subject should be construed in conjunction with laws which guarantee the subjects' fundamental rights to freedom – in our instant case Article 5 of the Federal Constitution – and whenever possible to be so construed as to afford respect and recognition of such right – *Walsh v. Sec. of State for India* [1863] 10 HLC 367 in particular at 386 per Lord Westbury LC. The power under the restrictive laws can only be exercised in accordance with the procedure laid down by the law – *State of U.P. v. Lalai Singh Yadav* [1977] CLR (SC) 121; and in the event of any failure to confirm to such procedure, the Court may construe it in favour of

the subjects' liberty. See *Tan Boon Seng v. Minister of Home Affairs, Malaysia & Another* [1990] 1 MLJ 171. The need to conform strictly to procedure has been expressed by Lee Hun Hoe CJ Borneo in *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 in the following term:

> In the matter fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observe in depriving a person of his liberty. The material provisions of the law authorizing detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law the detention is bad and the person detained is entitled to be released forthwith.

In this present case it was quite evident that the stated charges/allegations for the detention order to be issued by the Minister under s. 4(1) of the Ordinance arose from the report made to the Minister after the police investigations were completed upon the arrest of the applicant by the police under s. 3 of the Ordinance as shown in the Deputy Minister's affidavit (encl. 12) filed on behalf of the respondents. The relevant portions read as:

> Daripada laporan lengkap penyiasatan yang berkaitan dengan aktiviti Pemohon yang telah saya terima, saya telah berpuashati bahawa Pemohon adalah seorang penjenayah yang melakukan jenayah yang berunsur kekerasan dan adalah perlu Pemohon ditahan dengan tujuan hendak mencegah beliau daripada melakukan perbuatan jenayah yang melibatkan kekerasan. Seterusnya pada 10.5.2002, saya telah membuat satu Perintah Tahanan di bawah Seksyen 4(1) Ordinan Darurat (Ketenteraman Awam Dan Mencegah Jenayah), 1969 yang mengarahkan supaya Pemohon ditahan bagi tempoh 2 tahun mulai dari 11.5.2002 (selepas ini dirujuk sebagai "Perintah Tahanan tersebut") di Pusat Pemulihan Akhlak Simpang Renggam, Johor.

and also:

> Di atas arahan saya, pegawai saya bernama ABDUL RAHIM BIN MISBAN telah menyediakan Alasan-alasan yang atasnya saya membuat Perintah Tahanan tersebut dan Tuduhan-tuduhan fakta yang di atasnya Perintah Tahanan tersebut diasaskan.

In the circumstances, the detention of the applicant under s. 4 of the Ordinance was a continuation or consequential progression of the initial arrest/detention of the applicant by the police under s. 3 of the Ordinance. It, therefore, followed that the Minister's order for the detention of the applicant was dependent on the report made to him by the police after the police had arrested and detained the applicant under s. 3 of the Ordinance. Thus, in my humble view, if there

was a violation of the provisions of s. 3 of the Ordinance in so far as the rights of the applicant were concerned then his continued detention arising therefrom became unlawful and improper. In such circumstances the applicant was entitled to be set free on a writ of *habeas corpus*. He was entitled to the protection guaranteed by art. 5 of the Federal Constitution which in Part II under "Fundamental Liberties" specifically provides in art. 5(1) and 5(2) that:

> 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> 5(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

In *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara (and 4 Other Appeals)* [2002] 4 CLJ 309 which was an appeal against a High Court's refusal to grant the writ of *habeas corpus* in respect of a detention under the Internal Security Act 1960 (ISA) the Federal Court's judgment dealt with, *inter alia*, the provisions of s. 73 and s. 8 of the ISA which are in some respects similar to ss. 4 and 3 respectively of the Ordinance. Particularly, s. 73(3) of the ISA and s. 3(3) of the Ordinance are almost identical whilst s. 8(1) of the ISA and s. 4(1) of the Ordinance are similar in respect of the Minister's satisfaction that the detention of a person is required in the respective circumstances as therein provided.

Section 73 of ISA provides as follows:

> 73(1) Any police officer may without warrant arrest and detain pending enquires any person in respect of whom he has reason to believe
>
> (a) that there are grounds which would justify his detention under section 8; and
>
> (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.
>
> (2) Any police officer may without warrant arrest and detain pending enquires any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

(3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:

Provided that:

(a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and

(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

(4) - (5) (Repealed).

(6) the powers conferred upon a police officer by subsections (1) and (2) may be exercised by any member of the security forces, any person performing the duties of guard or watchman in a protected place and by any other person generally authorized in that behalf by Chief Police Officer.

(7) Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorized generally or specially by the Minister.

and s. 8 of the ISA states as follows:

8(1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.

(2) In subsection (1) "essential services" means any service, business, trade, undertaking, manufacture or occupation included in the Third Schedule.

(3) Every person detained in pursuance of a detention order shall be detained in such place (hereinafter referred to as a place of detention) as the Minister may direct and in accordance with any instructions issued by the Minister and any rules made under subsection (4).

(4) The Minister may by rules provide for the maintenance and management of places of detention and for the discipline and treatment of persons detained therein, and may make different rules for different places of detention.

(5) If the Minister is satisfied that for any of the purposes mentioned in subsection (I) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but that for that purpose it is unnecessary to detain him, he may make an order (hereinafter referred to as a restriction order) imposing upon that person all or any of the following restrictions and conditions:

(a) for imposing upon that person such restrictions as may be specified in the order in respect of his activities and the places of his residence and employment;

(b) for prohibiting him from being out of doors, between such hours as may be specified in the order, except under the authority of a written permit granted by such authority or person as may be so specified;

(c) for requiring him to notify his movements in such manner at such times and to such authority or person as may be specified in the order;

(d) for prohibiting him from addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to, any organization or association, or from taking part in any political activities; and

(e) for prohibiting him from traveling beyond the limits of Malaysia or any part thereof specified in the order except in accordance with permission given to him by such authority or person as may be specified in such order.

(6) Every restriction order shall continue in force for such period, not exceeding two years, as may be specified therein, and may include a direction by the Minister that the person in respect of whom it is made shall enter into a bond with or without sureties and in such sum as may be specified for his due compliance with the restrictions and conditions imposed upon him.

(7) the Minister may direct that the duration of any detention order or restriction order be extended for such further period, not exceeding two years, as he may specify, and thereafter for such further periods, not exceeding two years at a time, as he may specify, either:

(a) on the same grounds as those on which the order was originally made;

(b) on grounds different from those on which the order was originally made; or

(c) partly on the same grounds and partly on different grounds:

Provided that if a detention order is extended on different grounds or partly on different grounds the person to whom it relates shall have the same rights under section 11 as if the order extended as aforesaid was a fresh order, and section 12(1) shall apply accordingly.

(8) The Minister may from time to time by notice in writing served on a person who is the subject of a restriction order vary, cancel or add to any restrictions or conditions imposed upon that person by that order, and the restrictions or conditions so imposed shall, unless sooner cancelled, continue in force for the unexpired portion of the period specified under subsection (6) or (7).

The relationship between s. 73 and s. 8 of the ISA has been stated by Salleh Abas LP (as he then was) in *Re Tan Sri Khalid bin Raja Harun* [1988] l MLJ 182 to be thus:

> The arrest and detention under s. 73(1) is pending enquires to see if an order under s. 8 should be made by the Minister. It is clear from the language of the two sections that s. 73 provides for the initial detention and cannot be divorced from s. 8 of the Act which provides for the final detention.

Then, in *Theresa Lim Chin-Chin & Ors v. Inspector General of Police* [1988] 1 MLJ 293 Salleh Abas (LP) (as he then was) elaborated upon the relationship between the two sections of the ISA ie, s. 73 & s. 8 in the following terms:

> Looking at the provision relating to preventive detention, we cannot see how the police power of arrest and detention under s. 73 could be separated from the ministerial power to issue an order of detention under s. 8. We are of the opinion that there is only one preventive detention and that is based on the order to be made by the Minister under s. 8. However, the Minister will not be in a position to make that order unless information and evidence are brought before him, and, for this purpose, the police is entrusted by the Act to carry out the investigation and, pending inquiries, to arrest and detain a person, in respect of whom the police has reason to believe that there exists grounds which would justify the detention of such person under s. 8. There can be no running away from the fact that the police power under s. 73 is a step towards the ministerial power of issuing an order to detention under s. 8, which the Attorney-General referred to as the initial stage in the process of leading to preventive detention.

In *Mohamd Ezam bin Mohd Noor (supra)* Steve LK Shim CJ (Sabah & Sarawak) was of the view that s. 73 & s. 8 of the ISA are not wholly dependant on each other. His Lordship, after referring to both *Re Tan Sri Khalid* and *Theresa Lim (supra)* stated:

From the excerpts above, it seems clear that both *Re Tan Sri Raja Khalid* and *Theresa Lim* are decided principally on the basis that s. 73(1) and s. 8 are inextricably linked and as such, s. 16 of the Act which expressly applies to s. 8, should, by implication, also apply to s. 73(1), thereby giving rise to a situation where the court would be precluded from inquiring into the existence and/or sufficiency of the grounds under the section aforesaid. On that basis and reinforced by the provisions of Clause (3) of Article 151 of the Constitution, they hold that the subjective test should apply in determining the words "reason to believe" in s. 73(1). Everything, it seems, turns upon this inextricable connection between s. 73(1) and s. 8 thus, it becomes an issue for consideration.

By "inextricably connected" I would take it to mean that s. 73 and s. 8 are wholly dependant on each other that there has to be a police investigation under s. 73 before the Minister can properly exercise his discretion to issue a detention order under s. 8 or conversely, that no detention order under s. 8 can properly be issued by the Minister without the necessary investigation by the police under s. 73. In my view, such a proposition would have the effect of inhibiting or restricting the unfettered discretion of the Minister. It would mean that the Minister could not, on his own and independent of the police, conduct any investigation or take into consideration factors extraneous to those arising from police investigation under s. 73. What matters of national interest are infinitely varies. So are matters of national security of the State. These are the concerns of the Minister. In the exercise of his discretion, he need not necessarily have to consider and rely on police investigation. This is implicit in the very nature of an unfettered discretion. There may will be other public considerations of a political, social or economic nature having an impact on national security which are purely within his peculiar knowledge and which he considers relevant to his decision. Furthermore, police investigation under s. 73 may stop short of submission or reference to the Minister where circumstances reveal insufficient evidence to warrant the continued detention of the detainee. In such a case, the matter would, quite conceivably, never reach the door of the Minister. Does it then follow that the powers of the Minister under s. 8 have become impotent and stagnant?

Abdul Malek Ahmad FCJ in his judgement in *Mohamd Ezam bin Mohd Noor*'s *(supra)* quoted from Durga Das Basu's text book entitled "*Administrative Law*" with regards to *habeas corpus* and further stated as follows:

The object is issuing the writ is to ascertain whether there is any legal justification for the detention of the person in custody. The merit of the case or the moral justification for imprisoning the petitioner is no relevant consideration in a proceeding for *habeas corpus*. Thus, a person charged with treason or murder is entitled to be set at liberty, if his imprisonment has not taken place in due course of law.

A detention, thus, becomes unlawful not only where there is no law to justify it but also where procedure prescribed by the law which authorizes the detention has not been followed, and, in determining whether such procedure has been complied with, the court applies a strict standard, not only in interpreting the terms of the statute but also in exacting a strict compliance with the requirements, so interpreted, in fact. The need for this strict standard was explained in the celebrated dictum of Brett, LJ, in *Thomas Dale*'s case [1871] 6 QB 376 (461):

> It is a general rule which has always been acted by the courts in England that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular and if he fails to follows every step in the process with extreme regularity the court will not allow the imprisonment to continue.

These words are echoed in the observation of Sastri, CJ, of our Supreme Court in *Ram Narayanan v. State of Delhi* [1953] SCR 652 (655):

> those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law. That has not been done in this case. The petitioners now before us are, therefore, entitled to be released, and they are set at liberty forthwith.

In my humble view, in cases involving the personal liberty of a person each and every aspect of protection, be it procedural or technical, becomes very material. When it is violated the subject is entitled to look to the law and the courts to ensure that this right to liberty is not curtailed by the violation or omission of any procedural or technical safeguard as otherwise the safeguard envisaged will be meaningless and a mere fiction dressed up with apparently protective clothing made by way of porous material thereby offering no protection at all in reality. This right is not to be a mere illusion. The remedy through a writ of *habeas corpus* must be available in such circumstances.

In *Nasharudin*'s case *(supra)* the High Court had found that the Minister's decision to detain under s. 8 of the ISA was tainted because of breach of s. 73 of the ISA when infact the application was against the earlier detention by the police. Steve LK Shim, CJ (Sabah & Sarawak) was of the view of the view that in such case the application ought to have been against the detention order issued by the Minister under s. 8 of the ISA. In his judgment his Lordship stated thus:

> It is trite law that the remedy of *habeas corpus* is intended to facilitate the release of persons actually detained in unlawful custody. It is the fact of detention which gives the court its jurisdiction (see *Barnardo v. Ford* [1892] AC 326)

The observation made by Choor Singh J in *Re Onkar Shrian* [1970] 1 MLJ 28 is particularly instructive. He said:

> Where the personal freedom of an individual is wrongly interfered with by another, the release of the former from illegal detention may be effected by *habeas corpus*. The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus*.

The learned judge also quoted with approval the following passage in *Short & Mellor's Practice on the Crown Side*, 2nd edn at p 309:

> The primary object of the writ is for the purpose of bringing the body into court, and therefore, if that is impossible, the writ ought not to issue. It should not be used punitively but only remedially. In *R v. Barnado* [1892] AC 316, Lord Halsbury said that he could nit agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. In this the rest of the court agreed.

In the result, Choor Singh J took the position that a writ of *habeas corpus* had to be addressed to the person or authority having actual physical custody of the person alleged to be detained illegally. That, in my view, represents a correct statement of the law. In a situation where the court finds it impossible to issue the writ because the person or authority no longer has custody of the detainee, it should not hear the application. Indeed, it has no jurisdiction to do so. This is precisely the position in the instant case. Here, the facts show that when the application came up for full argument before the court, the police no longer had custody of the respondent. Custody had been transferred to the Minister upon the issuance of a detention order under s. 8 of the ISA. In the circumstances, it would have been appropriate for the respondent to file a fresh notice of motion for a writ against the detention order issued by the Minister. In the absence of such a motion, the court had embarked on a misconceived course of action in assuming jurisdiction.

The factual situation and the issues in *Nasharuddin*'s case *(supra)* are different from the present case. The allegation therein was whether there were sufficient grounds for the police to have acted under s. 73 of the ISA. The Federal Court's judgment also dealt with the issue of whether the Minister's subjective satisfaction for the detention of the detainee could be questioned based on the principles expounded in the case of *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 and s. 8 of the ISA. The crux of the

attack by the detainee in *Nasharuddin*'s case was against the decision of the Minister in making the detention order. There was no complaint about any non-compliance with any procedural requirement in the ISA governing the Minister's act or decision.

Further, both *Mohd Ezam*'s and *Nasharuddin*'s cases *(supra)* involved matters of national security and in such cases the courts have been vary of interfering with the discretion invested in the Minister to decide upon the detention of persons in the interests of national security. In *Nasharuddin*'s case *(supra)* his lordship, Steve LK Shim CJ (Sabah and Sarawak), referred to this and stated that:

> Now, matters of national security have always been considered by the courts to have a peculiar texture. They have called for special treatment. In such matters, Ong Hock Thye CJM in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 appears to adopt the more realistic approach taken by the English authorities. In dealing with the ISA in the context of article 149 of the Constitution, he said this:
>
> > Under article 149 any provision in the Internal Security Act designed against action prejudicial to national security is declared 'valid notwithstanding that it is inconsistent with any of the provisions of article 5, 9 or 10', namely, the fundamental liberties. This, of course, means sanction of encroachments on the rule of law, justified in the national interest. Under the circumstances, I think it must be frankly acknowledged that a perfect decision is in most cases an unattainable ideal. Once this fact, is appreciated it seems to me that the issues raised in this appeal require a realistic approach rather than as an exercise in semantics ...
>
> > Perusing both English and Indian authorities has been no small task, but at the end of it all, I would sum up by saying that, in my humble opinion, English courts take a more realistic view of things, while Indian judges, for whom I have the highest respect, impress me as indefatigable idealists seeing valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers.
>
> I think it is fair to say that his lordship's preference for English authorities over Indian ones could be confined to the context of the issues before him. These of course relate essentially to detention orders issued by the Minister under the ISA. In matters of preventive detention relating to national security, the judges are the executive. That proposition was firmly laid down by Lord Fraser in *Council of Service Unions & Ors v. Minister of Civil Service* [1985] 1 AC 374 (or the CCSU case) wherein he said:

> Those who are responsible for the national security must be the sole judge of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

This might well have moulded the perception of the Federal Court in *R Rama Chandran (supra)* wherein Edgar Joseph JR FCJ said that where policy considerations were involved in administrative decisions and courts did not possess knowledge of the policy considerations which underlay such decisions, courts ought not to review them. His lordship reiterated the same stand in the *MPPP* case. In *Sugumar Balakrishnan*, Gopal Sri Ram, in the Court of Appeal, I think, made a pertinent observation. After a lengthy discussion on the various aspects of judicial review, he said this:

> Nothing we have said thus far is to be taken as affecting cases that involve either national security or national interest. It is obvious that special consideration must be given to those cases as a matter of judicial policy ... because the subject matter in respect of which judicial review is sought is one is best left to the executive arm of the government to deal with according to the exigencies of the particular case and based upon information that is exclusively available to it.

It seems apparent from these cases that where matters of national security and public order are involved, the court should not intervene by way of judicial review or be hesitant in doing so as these are matters especially within the preserve of the executive, involving as they invariably do, policy considerations and the like.

**Is A Detention Under The Ordinance Subject To Judicial Review?**

A point I also had to consider was whether the detention of a person under s. 3 of the Ordinance could be the subject matter of a judicial review.

Now, s. 7c of the Ordinance expressly provides that:

> (1) There shall be no judicial review in any court of and no court shall have or exercise any jurisdiction in respect of any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Ordinance, save in regard to any question on compliance with any procedural requirement in this Ordinance governing such act or decision.
>
> (2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 4C.

And s. 4C of the Ordinance states:

> No detention order shall be invalid or inoperative by reason:
>
> (a) that the person to whom it relates:
>
> (i) was immediately after the making of the detention order detained in any place than a place of detention directed by the Minister under section 4(2) (hereinafter in this section referred to as "the place of detention");
>
> (ii) continued to be detained immediately after the making of the detention order in the place in which he was detained under section 3 before his removal to the place of detention, notwithstanding that the maximum period of such detention under section 3(3) had expired; or
>
> (iii) was during the duration of the detention order on journey in police custody or any other custody to the place of detention; or
>
> (b) that the detention order was served on him at any place other than the place of detention, or that there was any defect relating to its service upon him.

The term "judicial review" is interpreted in s. 7D of the Ordinance as follows:

> In this Ordinance, "judicial review" includes proceedings institute by way of:
>
> (a) an application for any of the prerogative orders of mandamus, prohibition and *certiorari*;
>
> (b) an application for declaration or an injunction;
>
> (c) a writ of *habeas corpus*; and
>
> (d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di-Pertuan Agong or by the Minister in accordance with this Ordinance.

It is, therefore, clear that judicial review, generally, and a writ of *habeas corpus*, in particular, could be granted if there had been non compliance by the Minister or the Yang di-Pertuan Agong with any procedural requirement in the Ordinance governing the exercise of discretionary power vested under the Ordinance. Thus, whilst s. 7c of the Ordinance expressly bars judicial review of the Minister's discretionary power such as in s. 4(1) of the Ordinance save in respect of non compliance of procedural requirements the Ordinance does not expressly exclude judicial review, including by way of a writ of *habeas corpus*, in any way whatsoever in respect of the powers of the police to detain

a person under s. 3 of the Ordinance. Thus, the exercise of the powers of detention by the police under s. 3 of the Ordinance is amenable to judicial review as it is not restricted or limited in any way by the Ordinance.

It is also to be noted that s. 4C of the Ordinance specifically makes provisions for a detention order not to be invalid or inoperative on certain grounds. This section reads as follows:

> No detention order shall be invalid or inoperative by reason:
>
> (a) that the person to whom it relates:
>
> (i) was immediately after the making of detention order detained in any place other than a place of detention directed by the Minister under section 4(2) (hereinafter in this section referred to as "the place of detention");
>
> (ii) continued to be detained immediately after the making of the detention order in the place in which he was detained under section 3 before his removal to the place of detention, notwithstanding that the maximum period of such detention under section 3(3) had expired; or
>
> (iii) was during the duration of the detention order on journey in police custody or any other custody to the place of detention; or
>
> (b) that the detention order was served on him at any place other than the place of detention, or that there was any defect relating to its service upon him.

Thus, it is clear that whilst excusing certain breaches of procedures in some circumstances it does not excuse detention without the necessary authorization as required under s. 3(3) of the Ordinance. Consequently, a detention in breach of the time limits specified in the said section is unlawful.

**The Remedy**

Having considered all the facts and the relevant provisions of the Ordinance, the Federal Constitution and the authorities cited I decided to give the applicant the benefit of the doubt that his continued detention for a further 24 hours from 3.10pm on 15 March 2002 may have been authorized after 3.10pm on that said date which meant that the continued detention thereafter was improper and unlawful. This did not mean or imply that the Minister's reasons to have detained the applicant under s. 4(1) of the Ordinance were tainted, bad, unreasonable or questionable. The Federal Court's decision in *Nasharuddin*'s case *(supra)* cited on behalf of the respondents could be distinguished and does

not, on a proper reading, in my humble view, bar the granting of a writ of *habeas corpus* if any of the stages of the initial commencement of the detention of a person such as under s. 3 of the Ordinance is procedurely and/or substantially illegal or improper.

After taking into consideration all the relevant matters I was of the view that the applicant was entitled to his freedom not because the decision or reasons to detain him under s. 4 of the Ordinance were bad, tainted or *mala fide* but because the protection accorded to him by s. 3 of the Ordinance had been violated prior to his continued detention under s. 4 of the Ordinance.

In all the circumstances, I granted the application and ordered the applicant to be released forthwith.